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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

## This Document Relates To:

## ALL ACTIONS

Case No. 09-md-02121-LAB-POR

MDL No. 2121

## CLASS ACTION

**PLAINTIFFS' OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS CONSOLIDATED CLASS  
ACTION COMPLAINT**

Honorable Larry A. Burns  
Location: Courtroom 9, 2nd Floor

Hearing Date: November 1, 2010  
Hearing Time: 12:15 p.m.

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1    **I. INTRODUCTION**

2       The Consolidated Class Action Complaint (“Complaint”) alleges facts supporting plausible claims  
 3 that the named defendant manufacturers<sup>1</sup> conspired with dominant retailer Guitar Center, Inc. (“Guitar  
 4 Center”) and others to fix retail prices for guitar amplifiers and fretted instruments through strict  
 5 enforcement of minimum advertised price polices (“MAPPs”). The National Association of Music  
 6 Merchants, Inc. (“NAMM”), the leading music industry trade association, was the impetus for the  
 7 conspiracy. Defendants participated in private meetings arranged by NAMM, where they exchanged  
 8 competitively-sensitive information about costs, prices and margins, and discussed MAPPs. At these  
 9 meetings, Defendants advocated and agreed to use of MAPPs to stabilize retail prices. Guitar Center then  
 10 used its market dominance to corral manufacturers into enforcing MAPPs with retailers, which eliminated  
 11 retail price competition and stabilized prices.

12       The Complaint includes more than one hundred fifty paragraphs of extensive factual detail  
 13 describing the alleged conspiracy. The Complaint identifies the dates and locations of the NAMM meetings,  
 14 and contains facts placing Defendants at the meetings. It contains publicly available price data showing that  
 15 retail unit prices, after falling steadily in the years leading up to the conspiracy, stabilized and then increased  
 16 as the conspiracy was enforced. It also references a Federal Trade Commission (“FTC”) investigation of  
 17 collusive practices in the music products industry, culminating in charges that NAMM had engaged in  
 18 anticompetitive conduct for arranging meetings for competitors to share competitively-sensitive information  
 19 and discuss implementation and enforcement of the MAPPs.

20       Defendants jointly move to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rule of  
 21 Civil Procedure. None of Defendants’ arguments warrants dismissal.

22       First, the Complaint alleges a plausible conspiracy. The type of collusion alleged here—where  
 23 manufacturers fixed prices through vertical restraints dictated by a dominant retailer—was envisioned by the  
 24 Supreme Court in *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877, 892094 (2007); *see also*  
 25 *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000) (affirming FTC’s finding that dominant retailer

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26  
 27       <sup>1</sup> The Manufacturer Defendants are: Fender Musical Instruments Corp. (“Fender”), Gibson Guitar Corp.  
 28 (“Gibson”), Hoshino (U.S.A.), Inc. (“Hoshino”), Kaman Music Corp. (“Kaman”), Yamaha Corporation of America (“Yamaha”), and Roland Corporation U.S. (“Roland”).

1 had used its market power to coerce manufacturers into vertical agreements that limited competition from  
 2 discount retailers). Each of the Defendants benefitted from the conspiracy, which stabilized and increased  
 3 prices for guitar amplifiers and fretted musical instruments (*i.e.*, acoustic guitars, electric guitars, bass  
 4 guitars, banjos and mandolins).

5 Second, Plaintiffs have pleaded the factual elements of the alleged conspiracy in accordance with the  
 6 mandates of Rule 8(a) of the Federal Rule of Civil Procedure and the Supreme Court's decision in *Bell*  
 7 *Atlantic v. Twombly*, 550 U.S. 544 (2007). Defendants' assertion that more is necessary to show plausibility  
 8 is unwarranted. *See In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1142, n.7 (N.D.Cal. 2009)  
 9 ("[A]llegations of antitrust conspiracy need not be detailed on a 'defendant by defendant' basis."); *Starr v.*  
 10 *Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) ("*Starr*") ("[P]laintiffs [a]re not required to  
 11 mention a specific time, place or person involved in each conspiracy allegation.").

12 Third, the information set forth in the Complaint comes from public records, including records of the  
 13 FTC investigation and settlement with NAMM. Records of governmental investigations are regarded as  
 14 reliable sources of information. Courts routinely look to those materials to bolster the plausibility of  
 15 Plaintiffs' claims. *Starr*, 592 F.3d at 325.

16 Finally, the Complaint alleges appropriate product markets and contains sufficient facts to support  
 17 Plaintiffs' claims that the alleged conspiracy had an adverse competitive effect. The motion to dismiss  
 18 should be denied in its entirety.

19 **II. FACTUAL ALLEGATIONS**

20 **A. Plaintiffs Allege Agreement, Conspiracy Or Concerted Action**

21 Plaintiffs allege that in the late 1990s and continuing thereafter, Guitar Center, the Manufacturer  
 22 Defendants and others fashioned, encouraged and adopted MAPP pricing as a means to maintain or increase  
 23 high profit margins. (¶¶ 2, 77, 80-83, 108, 111.)<sup>2</sup> Initially, the MAPPs were not universally enforced by  
 24 Guitar Center or its suppliers. (¶ 79.) Starting in about 2004, however, as Guitar Center and other brick-

27 \_\_\_\_\_  
 28 <sup>2</sup> "¶ \_\_" refers to paragraphs of the Complaint. "Mem." refers to the Memorandum of Points and Authorities  
 in Support of Defendants' Motion To Dismiss (Dkt. 83-1).

1 and-mortar retailers faced increasing retail competition from internet-based resellers and “big-box” stores,<sup>3</sup>  
 2 Guitar Center agreed with the Manufacturer Defendants and other NAMM-member retailers to set MAPPs  
 3 at higher levels than before and to strictly enforce the MAPPs. (¶¶ 84-85.)

4 The Complaint describes a “hub-and-spoke” retail price maintenance conspiracy, with Guitar Center  
 5 at its center. Plaintiffs allege that Guitar Center, the Manufacturer Defendants and NAMM’s other retail  
 6 members met and agreed to exchange competitive cost and pricing information, devise and implement  
 7 MAPPs for the Manufacturer Defendants’ products, and strictly enforce the MAPPs by requiring that all  
 8 retailers charge minimum retail prices for the Manufacturer Defendants’ products, and sanctioning  
 9 noncompliant retailers that failed to adhere to MAPP prices. (¶¶ 85, 108, 110-13.) Plaintiffs contend that  
 10 the conspiracy took the form of a series of vertical restraints on trade, or spokes (the MAPPs), which were  
 11 implemented and adhered to as between the Manufacturer Defendants, Guitar Center and other retailers. (¶¶  
 12 86, 108, 111-12.) The Manufacturer Defendants also agreed to implement horizontal restraints on trade, by  
 13 requiring and enforcing MAPPs with similar minimum advertising pricing terms with the knowledge that  
 14 other Manufacturer Defendants and competitors would require Guitar Center and competing retailers to  
 15 accept MAPPs as part of their written retail distribution contracts. (¶¶ 86, 90, 108, 110-13.) These  
 16 horizontal restraints form the “rim” of the alleged hub-and-spoke conspiracy.

17 The Complaint asserts that NAMM and its constituent retailer members provided the impetus for the  
 18 alleged conspiracy. (¶ 87.) Plaintiffs allege that, on specified dates between 2004 and 2008, NAMM  
 19 organized private meetings and programs at semi-annual trade shows and invitation-only global summits,  
 20 through which MAPPs were promoted and endorsed by NAMM as a means of reducing price competition  
 21 and maintaining high retail prices for NAMM’s retail members. (¶¶ 92-93, 97-103.) Guitar Center and each  
 22 of the Manufacturer Defendants are members of NAMM. (¶ 26.) Plaintiffs allege that, during the period of  
 23 the alleged conspiracy, NAMM used these private meetings to enable Guitar Center, the Manufacturer  
 24 Defendants, and other NAMM members to exchange cost and pricing information, and to discuss MAPPs  
 25 and ways to restrict retail price competition. (¶¶ 34, 75, 95-107.) NAMM determined the scope of the

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26  
 27 <sup>3</sup> “Brick-and-mortar” refers to “a traditional business serving customers in a building as contrasted to an  
 28 online business.” See Merriam-Webster Online Dictionary. A “big-box” store is a chain store having a  
 boxlike structure. *Id.* WalMart, KMart, and BestBuy are examples of “big-box” retailers.

1 information exchanged at these meetings by selecting panel moderators and setting program agendas. (¶¶  
 2 97-98, 101-03, 118, 121.) NAMM panelists consistently rolled out MAPPs at these meetings and told  
 3 attendees that “prices would rapidly migrate down to 10% over cost” without MAPPs, that MAPPs are “only  
 4 as effective as [their] enforcement,” and that MAPPs already in place should be revised “upwards to give  
 5 retailers a better profit margin.” (¶¶ 82-83, 95, 97, 100.)

6 The Complaint describes Defendants’ specific roles in furthering the alleged conspiracy. Plaintiffs  
 7 allege that representatives from Guitar Center and each Manufacturer Defendant attended and participated in  
 8 NAMM events at which MAPPs were discussed. (¶¶ 34, 93-94, 98-100, 103.) They also allege that  
 9 between 2004 and 2008, top executives of several Defendants held positions on NAMM’s board of  
 10 directors,<sup>4</sup> where they helped set NAMM’s program agendas, furthered exchanges of cost and pricing  
 11 information, and knew of and facilitated discussions among Defendants and others about MAPPs, their  
 12 enforcement, and ways to restrict retail price competition. (¶¶ 84, 93-94, 108.)

### 13       B.     Plaintiffs Allege Relevant Markets And Market Power

14       The Complaint uses “Musical Instruments and Equipment” to describe markets of new, high-quality  
 15 fretted instruments (including constituent sub-markets of acoustic guitars, electric guitars, bass guitars,  
 16 banjos, and mandolins) and guitar amplifiers. (¶¶ 1, 38, 67.) Plaintiffs use the term “new” to distinguish  
 17 the markets from markets for used musical instrument and equipment. The term “high-quality” is used to  
 18 distinguish the markets from markets for toy, generic or unbranded products.

19       Plaintiffs allege that members of the public recognize the Musical Instruments and Equipment  
 20 markets described in the Complaint as distinct economic entities, and that the Manufacturer Defendants’  
 21 fretted instruments and guitar amplifiers serve as competitive substitutes for like products within those  
 22 markets. Specifically, the Complaint alleges that the Manufacturer Defendants’ fretted instruments and  
 23 guitar amplifiers require special manufacturing and production facilities, are used by professional musicians,

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 26       <sup>4</sup> Yamaha’s Senior Vice President, Terry Lewis, served on NAMM’s board of directors from 2003-2005.  
 27 Kaman’s Vice President of Marketing and Sales, Paul Damiano, served on NAMM’s board from 2003 to  
 28 2006. Roland’s Chief Executive Officer and President, Dennis Houlihan, was a NAMM board member for  
 nearly a decade, culminating in NAMM’s first commercial chairman, a position held by Mr. Houlihan from  
 2005 through 2007. Fender’s Chief Executive Officer, Bill Mendello, and Hoshino’s President, Bill Reim,  
 held NAMM board positions from 2006 to 2009. (¶¶ 28, 30-33.)

1 carry brand-names that consumers recognize and desire, and are sold primarily at specialty retail stores  
 2 including Guitar Center. (¶¶ 29, 31-32, 64, 66, 69.)

3         Included within the markets described in the Complaint are specific types of fretted instruments—  
 4 acoustic guitars, electric guitars, bass guitars, banjos and mandolins—and guitar amplifiers that are  
 5 reasonably interchangeable with one another. (¶ 1.) An electric guitar manufactured by Fender, for  
 6 example, is reasonably interchangeable with an electric guitar manufactured by Yamaha, Gibson, Kaman or  
 7 Hoshino. Similarly, a guitar amplifier made by Roland is reasonably interchangeable with one made by  
 8 Fender, Gibson, Hoshino, Kaman or Yamaha.

9         Plaintiffs allege that Defendants had the market power or capacity to inhibit retail price competition  
 10 within the alleged product markets. As alleged in the Complaint, the Manufacturer Defendants ranked  
 11 among the largest manufacturers and distributors of fretted instruments and guitar amplifiers between 2004  
 12 and 2008. Collectively, they possessed significant market power over the relevant product markets. (¶¶ 65,  
 13 67.) Plaintiffs allege that specialty music stores, including Guitar Center, were the main retail sales venues  
 14 for the Manufacturer Defendants' products during the relevant period and that Guitar Center was the  
 15 dominant specialty retail sales outlet above all others for these products. (¶¶ 53-60.)<sup>5</sup> Guitar Center  
 16 exercised market power by dictating MAPPs for fretted instruments and guitar amplifiers to manufacturers,  
 17 influencing product offerings and pricing factors, procuring preferential pricing and other preferences from  
 18 manufacturers, and “strong-arming” manufacturers, including Yamaha and Fender, into not selling their  
 19 products to competing stores that planned to open near Guitar Center store locations. (¶¶ 61-64, 88-89.)

20         The Complaint also alleges that NAMM, as the predominant trade association for the music products  
 21 industry, had the ability to control prices and exclude retail price competition from internet or big-box  
 22 retailers during the period of the alleged conspiracy. NAMM is comprised of more than 9,000 members,

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23  
 24         <sup>5</sup> According to publicly-available data, Guitar Center had nearly 30% of the total music retail sales in the  
 25 United States between 2004 and 2008. (¶ 56.) This data is over-inclusive, as it includes products outside of  
 26 the relevant product market, such as generic or unbranded fretted instruments and guitar amplifiers and low-  
 27 cost imports. (¶ 70 n.2.) Although Guitar Center's percentage of retail sales of new, high-quality fretted  
 28 instruments and guitar amplifiers is not publicly available, though presumably within Defendants' possession,  
 Plaintiffs allege additional facts suggesting that percentage was far greater. (*Id.*) During this period, Guitar Center had eight times as many retail stores and five times as many sales revenues than its next largest competitor (¶¶ 55-57); was the largest retail customer of many of its manufacturers and suppliers, including Defendants Fender and Gibson, (¶ 60); and enjoyed exclusive rights to sell new, “limited edition” fretted instruments made by certain Manufacturer Defendants, including Gibson (¶ 64).

1 including most U.S. manufacturers, distributors and specialty musical instrument retailers, and its meetings  
 2 are considered an indispensable resource for musical instrument manufacturers and retailers. (¶¶ 26, 74, 76,  
 3 87.) Plaintiffs allege that NAMM, given its preeminence in the industry, was able to facilitate the exchange  
 4 of competitively-sensitive cost and pricing information among Guitar Center, the Manufacturer Defendants,  
 5 and NAMM's other retail and manufacturing members, and to assist them in devising and implementing  
 6 MAPPs to increase retail prices and profit margins. (¶¶ 5, 75, 84-87, 95-107, 110.)

### 7       C.     Plaintiffs Allege Antitrust Injury And Harm To Consumers

8 Plaintiffs allege that the conspiracy to implement and enforce the MAPPs served no legitimate pro-  
 9 competitive function and was designed solely to fix retail prices for fretted instruments and guitar amplifiers.  
 10 (¶¶ 3, 108-12.) According to the Complaint, Defendants' efforts to implement and enforce MAPPs for  
 11 fretted instruments and guitar amplifiers paid off in the form of higher retail prices. (¶¶ 3, 72, 73, 113.) The  
 12 Complaint alleges, based on publicly available data, that after falling for several years, consistent with the  
 13 enforcement of the alleged conspiracy, retail unit prices for fretted instruments and guitar amplifiers leveled  
 14 off or started to rise in 2004 even as demand slumped. Retail prices continued to rise during the course of  
 15 the alleged conspiracy until 2008, when the FTC conducted its investigation. (¶¶ 70-73, 116-21.) Plaintiffs  
 16 allege that, as a result of the conspiracy, Plaintiffs and other consumers paid the higher prices that the  
 17 Manufacturer Defendants required and that Guitar Center and other retailers charged under the MAPPs,  
 18 resulting in damage to their business or property. (¶¶ 72, 73, 113, 140, 145, 150, 159.)

### 19      D.     Plaintiffs' Allegations Are Bolstered By Published Reports And The FTC Investigation

20 The Complaint's allegations are buttressed by facts drawn from media accounts of NAMM meetings,  
 21 publicly-available sales and pricing data, and published reports of an FTC investigation and complaint in  
 22 which the FTC alleged that, between 2005 and 2007, NAMM organized meetings at which its members  
 23 were encouraged to communicate, and did in fact share, information about prices and strategies for  
 24 implementing MAPPs, restricting retail price competition, and securing higher retail prices for musical  
 25 instruments and related equipment. (¶¶ 52-57, 59-60, 62-63, 70-74, 92, 95-107, 118-21.) The FTC  
 26 investigation lends support to the plausibility of Plaintiffs' claims.

27 Among other things, Plaintiffs reference an FTC complaint issued after two years of investigation,  
 28 including a review of subpoenaed documents obtained from each of the Defendants named herein. (¶ 116.)

1 The FTC asserted in that complaint that, between 2005 and 2007: “NAMM organized meetings and  
 2 programs at which competing retailers of musical instruments were permitted and encouraged to discuss  
 3 strategies for implementing [MAPPs], the restriction of retail price competition, and the need for higher  
 4 retail prices. Representatives of NAMM determined the scope of discussion by selecting moderators and  
 5 setting the agenda for these programs. At these NAMM-sponsored events, competitors [including  
 6 Defendants named herein] discussed the adoption, implementation and enforcement of minimum advertised  
 7 price policies; the details and workings of such policies; appropriate and optimal retail prices and margins;  
 8 and other competitively sensitive issues.” ¶ 118 (citing FTC Complaint filed April 8, 2009 in *In the Matter*  
 9 *of National Association of Music Merchants, Inc.*, Docket No. C-4255, FTC File No. 001 0203).)

10 In assessing NAMM’s conduct, the FTC was cognizant of the fact that trade associations “may serve  
 11 valuable and pro-competitive functions, such as expanding the market in which its members sell; educating  
 12 association members, the public and government officials; conducting market research; establishing inter-  
 13 operability standards; and otherwise helping firms to function more efficiently.” ¶ 121.) Nonetheless, the  
 14 FTC concluded that “by arranging and encouraging the exchange among its members of competitively  
 15 sensitive information that had the purpose, tendency, and capacity to facilitate price coordination and  
 16 collusion among competitors,” NAMM’s activities “crossed the line that distinguishes legitimate trade  
 17 association activity from unfair methods of competition.” ¶¶ 119-20.) According to the FTC, “no  
 18 significant pro-competitive benefit” was derived from NAMM’s conduct during the period. (¶ 120.)

19 To settle these charges, the FTC entered into a Consent Order that prohibits NAMM from helping  
 20 competing retailers or manufacturers exchange pricing information and from promoting anticompetitive  
 21 schemes. (¶¶ 121-22.) In a published Analysis of Agreement (“Analysis”), the FTC explained that “[a]  
 22 Respondent violates Section 1 of the Sherman Act and Section 5 of the FTC Act when it engages in  
 23 concerted conduct that had the principal tendency or likely effect of harming competition and consumers.  
 24 The conduct of a trade association or its authorized agents is generally treated as concerted action.” (¶ 121.)  
 25 The Consent Order’s numerous references to the “exchange of information between or among Musical  
 26 Product Manufacturers” make clear that the FTC’s investigation concerned collusive conduct by and among  
 27 manufacturers in addition to retailers. (¶ 122.)

28 NAMM is required by the FTC Consent Order to change its business practices to avoid

1 anticompetitive activities. Since settling with the FTC, NAMM has: (1) provided antitrust training to its  
 2 board of directors; (2) revised its antitrust policy; (3) had antitrust counsel attend NAMM events; (4)  
 3 provided speakers with its revised antitrust policy; (5) required speakers to give notice in advance if they  
 4 intend to address price, terms, profit margins, MAPPs or resale price maintenance; (6) distributed an  
 5 overview of the antitrust laws to attendees of its trade shows; and (7) included introductory statements at  
 6 NAMM meetings that “[a]ny meeting such as this, where direct competitors such as manufacturers and  
 7 retailers come together, has the potential to create antitrust problems,” clearly advise that “NAMM must not  
 8 facilitate, encourage, or allow participants at its events to engage in any conduct which restricts competition  
 9 on price or output,” and state that “NAMM members must make pricing decisions independently or any  
 10 agreement or understanding with competitors.” (¶¶ 124-25.)

### 11 **III. DEFENDANTS' MOTIONS TO DISMISS**

12 The Court has before it three separate motions to dismiss pursuant to Rule 12(b)(6) of the Federal  
 13 Rule of Civil Procedure: (1) an omnibus motion joined by all Defendants; (2) a separate motion brought  
 14 solely by Roland; and (3) a third motion brought solely by NAMM. (Dkt. Nos. 81, 83-84.) The Court  
 15 authorized the filing of separate dismissal motions, as necessary, to address unique, non-overlapping issues.  
 16 (Dkt. No. 55.) As it turns out, the primary issue in each motion concerns whether Plaintiffs have alleged  
 17 sufficient facts to support a “plausible basis” for their claims, as required by *Bell Atl. Corp. v. Twombly*, 550  
 18 U.S. 544, 556 (2007). (Dkt No. 81-1, at 3; Dkt No. 83-1, at 4-5; Dkt No. 84-1, at 2-3.) Each of these  
 19 motions lacks merit and should be denied. This memorandum addresses Defendants’ omnibus motion to  
 20 dismiss. As described, above, Plaintiffs’ Complaint sets forth detailed factual allegations which, when  
 21 viewed as a whole and in context, provide a plausible basis for Plaintiffs’ claims under applicable pleading  
 22 standards.

### 23 **IV. LEGAL STANDARDS**

24 A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) tests the legal sufficiency of  
 25 the claims in the complaint. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).  
 26 “[D]ismissal [is] inappropriate unless the plaintiffs’ complaint fails to ‘state a claim to relief that is plausible  
 27 on its face.’” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Twombly*,  
 28 550 U.S. at 570). The Court must presume that all material allegations are true at this stage, and draw

1 reasonable inferences from them in Plaintiffs' favor. *See Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir.  
 2 2010). To survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a  
 3 right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

4 The Court must look to the complaint as a whole, and not independently scrutinize its component  
 5 parts. *See Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 902 (N.D. Ill. 2009) ("Defendants'  
 6 attempt to parse the complaint and argue that none of the allegations (i.e., quoted public statements, parallel  
 7 capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy-is  
 8 contrary to the Supreme Court's admonition that '[t]he character and effect of a conspiracy are not to be  
 9 judge by dismembering it and viewing its separate parts.'") (quoting *Continental Ore Co. v. Union Carbide*  
 10 & Carbon Corp.

- 11 370 U.S. 690, 698-00 (1962)). *Accord In re Pressure Sensitive Lablestock Antitrust Litig.*,  
 12 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) (stating that nothing in *Twombly* "contemplates [a]  
 13 'dismemberment' approach to assessing the sufficiency of a complaint. Rather, a district court must  
 consider the complaint in its entirety without isolating each allegation for individualized review.").

14 Rule 8(a) requires "only a short and plain statement of the claim showing the pleader is entitled to  
 15 relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests."  
 16 *Twombly*, 550 U.S. at 555 (internal quotations omitted). Although *Twombly* rejected the "no set of facts"  
 17 standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), the Supreme Court did "not require heightened  
 18 facts pleading of specifics, but enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

19 The test is not whether the plaintiff will "ultimately prevail but whether the claimant is entitled to  
 20 offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (cited in *Twombly*, 550  
 21 U.S. at 563, n. 8). A claim has facial plausibility when [Plaintiffs] plead factual content that allows the court  
 22 to draw the reasonable inference that [Defendants] are liable for the misconduct alleged." *Ashcroft v. Iqbal*,  
 23 \_\_ U.S. \_\_, 129 S.Ct. 1937, 1949 (2009). Plaintiffs need only "nudge[] their claims across the line from  
 24 conceivable to plausible." *Twombly*, 550 U.S. at 570.

## 25 V. ARGUMENT

### 26 A. The Allegations Are Sufficient To State A Claim Under *Twombly*

27 Plaintiffs' central claim is that Defendants violated Section 1 of the Sherman Act, which prohibits  
 28 "any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

1 commerce.” 15 U.S.C. § 1. Plaintiffs allege that Defendants met with each other at NAMM-sponsored  
 2 meetings, shared competitively-sensitive cost and pricing information, and collectively agreed to implement,  
 3 adhere to and enforce MAPPs, the effect of which was to fix, raise, maintain or stabilize the retail prices  
 4 paid by Plaintiffs and other consumers for fretted instruments and guitar amplifiers made by the  
 5 Manufacturer Defendants during the Class Period. (¶¶ 8, 38.)

### 6           **1.       The Plausibility Analysis Under *Twombly***

7           To state a claim, the complaint must contain enough factual matter to plausibly suggest that  
 8 Defendants entered into a contract, agreement, or concerted action, which was an unreasonable restraint on  
 9 trade, and caused injury to competition. *See Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992).  
 10 “Asking for plausible grounds to infer an agreement” does not subject antitrust claims to any heightened  
 11 pleading standard. *Twombly*, 550 U.S. at 556. “[I]t simply calls for enough facts to raise a reasonable  
 12 expectation that discovery will reveal evidence of an illegal agreement.” *Id.*

13           Thus, to satisfy *Twombly*, Plaintiffs may either plead an express agreement or state circumstantial  
 14 facts that “raise[] a suggestion of a preceding agreement.” *Id.* at 557. The Court can infer an agreement  
 15 from the factual context; Plaintiffs are not required to identify who entered into what agreements with what  
 16 terms on what dates. *See Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 325 (2d Cir. 2010) (rejecting  
 17 defendants’ argument that *Twombly* imposed an obligation to identify specifically the time, place and person  
 18 as to each allegation of the conspiracy); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 U.S.  
 19 Dist. LEXIS 65549, at \*50 (E.D. Mich. July 1, 2010) (same); *see also In re Graphics Processing Units*  
 20 *Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (plaintiffs need not plead “specific back-room  
 21 meetings between specific actors at which specific decisions were made.”); *In Re Southeastern Milk*  
 22 *Antitrust Litig.*, 555 F. Supp. 2d 934, 943-44 (E.D. Tenn. 2008) (complaints put defendants on notice and  
 23 stated claims “while not answering all specific questions about ‘who, what, when and where.’”).

24           Similarly, “allegations of antitrust conspiracy need not be detailed on a ‘defendant by defendant’  
 25 basis.” *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1142 n.7 (N.D. Cal. 2009); *see also*  
 26 *Hinds County v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 395 (S.D.N.Y. 2010) (Plaintiffs “need not  
 27 necessarily provide any particular details about conduct undertaken by [a specific defendant] in furtherance  
 28 of the conspiracy.”); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 903-

1 04 (N.D. Cal. 2008) (plaintiffs need not allege each defendant's specific role); *In re NASDAQ Market-*  
 2 *Makers Antitrust Litig.*, 894 F. Supp. 703, 712 (S.D.N.Y. 1995) (same)<sup>6</sup>

3           **2.       The Complaint Identifies A “Plausible” Conspiracy**

4       Here, there is an appropriate legal theory and sufficient factual content in the Complaint, viewed in  
 5 its entirety, to put Plaintiffs' allegations in a context suggestive of a plausible conspiracy.

6       First, the type of conspiracy alleged in the Complaint, in which a dominant retailer has sufficient  
 7 market power to coerce manufacturers into adopting and enforcing a series of vertical price restraints, is not  
 8 only plausible, but was anticipated by the United States Supreme Court:

9       Resale price maintenance . . . can be abused by a powerful manufacturer or retailer. A  
 10 dominant retailer, for example, might request resale price maintenance to forestall innovation  
 11 in distribution that decreases costs. A manufacturer might consider it has little choice but to  
 accommodate the retailer's demand for vertical price restraints if the manufacturer believes it  
 needs access to the retailer's distribution network.

12       *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 893-94 (2007).

13       The situation described in *Leegin* is exactly that at issue in this case. Plaintiffs allege that the  
 14 Manufacturer Defendants agreed to the demands of dominant retailer Guitar Center that they strictly enforce  
 15 MAPPs, so they could retain access to Guitar Center's massive retail customer base. (¶¶ 60, 89.) In light of  
 16 *Leegin*, Plaintiff's theory of antitrust liability is plausible. *See also Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d  
 17 928 (7th Cir. 2000) (affirming FTC's finding that dominant retailer had used its market power to coerce  
 18 manufacturers into vertical agreements that limited competition from discount retailers). Defendants'  
 19 contention that MAPPs are “a perfectly legal business practice,” (Mem. at 1.), is an improper attempt to  
 20 dispute the well-pleaded allegations of the Complaint that Defendants' agreements to implement and enforce  
 21 MAPPs and other resale price maintenance policies served no legitimate pro-competitive purpose. (¶¶ 3-4,  
 22 34, 84-91, 108-12.) These allegations are supported by the FTC. (¶¶ 119-21.)

23       Second, the Complaint describes the factual setting in which Defendants met, shared competitively-  
 24 sensitive cost and pricing information, and discussed strategies for implementing and enforcing MAPPs. The

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25  
 26       <sup>6</sup> Defendants cite cases in which the complaints failed to contain basic facts regarding the alleged  
 27 conspiracies. *See Jung v. Ass'n of Am. Med. Colleges*, 300 F. Supp. 2d 119, 164 (D.D.C. 2004) (dismissing  
 28 claims where plaintiffs failed to allege “each individual defendant joined the conspiracy and played some  
 role in it”); *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1135-37 (N.D. Cal. 2005) (dismissing  
 claims where complaint failed to allege scope of overall conspiracy or how those defendants participated at  
 all). These cases are readily distinguishable from the detailed facts Plaintiffs allege in their Complaint.

1 meetings occurred at NAMM-sponsored events. These include programs at semi-annual trade shows and  
 2 global summits sponsored by NAMM on particular dates between 2004 and 2008 in specified locations. (¶¶  
 3 92-93, 95-103, 106-07.) These facts are sufficient to put Defendants on notice as to where (Anaheim,  
 4 Carlsbad, Nashville, Indianapolis, and Austin) and when (the specific dates referenced in the Complaint)  
 5 Defendants are alleged to have participated or taken action in furtherance of the alleged conspiracy.

6 Third, the Complaint identifies the entities that were part of the alleged conspiracy. Specifically, the  
 7 Complaint alleges that, during the Class Period, each Defendant was a member of NAMM. (¶¶ 26.)  
 8 NAMM's role in the alleged conspiracy was to sponsor and arrange for private meetings for competing  
 9 retailers of musical instruments and other NAMM members to exchange information on competitively-  
 10 sensitive subjects—including prices, margins, MAPPs and their enforcement. (¶¶ 84-85, 92-107.) NAMM  
 11 representatives set the agenda for these meetings and helped steer the discussions. (¶¶ 74-75.) Guitar  
 12 Center and the Manufacturer Defendants were aware of and participated in these discussions, and assisted  
 13 NAMM in facilitating the conspiracy. At the time of these NAMM-sponsored meetings, the President of  
 14 Hoshino (Bill Reim), the CEO and President of Roland (Dennis Houlihan), a Senior Vice-President of  
 15 Yamaha (Terry Lewis), the Chief Executive Officer of Fender (Bill Mendello), and Kaman's Vice President  
 16 of Marketing and Sales served on NAMM's board of directors. (¶¶ 28, 30-33.) The Complaint alleges that,  
 17 by virtue of their NAMM Board roles, these Manufacturer Defendants were aware of and approved  
 18 NAMM's encouragement, implementation and enforcement of MAPPs during the Class Period, and/or  
 19 assisted NAMM in facilitating the alleged price-fixing conspiracy. (¶ 94.) *See Packaged Ice*, 2010 U.S.  
 20 Dist. LEXIS 65549, at \*89 (considering allegations regarding trade association director positions “in the  
 21 context of the entirety of Plaintiffs’ allegations”). Published reports of NAMM meetings, where available,  
 22 also help to place specific representatives of Guitar Center, Yamaha, Kaman and Fender at specific NAMM  
 23 meetings where strategies for implementing and enforcing MAPPs were discussed. (¶¶ 98, 103, 107.) In  
 24 addition to these facts, the Complaint alleges that NAMM's trade shows and invitation-only Global Summits  
 25 were widely regarded as an “indispensable resource” for owners and key personnel in the musical instrument  
 26 industry. (¶¶ 75-76, 106.) This allegation also supports an inference that key representatives of each  
 27 Defendant knew and approved NAMM's role in the conspiracy.

28 Defendants' criticisms of these allegations lack merit. (Mem. at 9-11.) Plaintiffs' allegations of

1 Defendants' participation in trade associations demonstrate the plausibility of a price-fixing conspiracy.  
 2 “[S]uch participation demonstrates how and when Defendants had opportunities to exchange information or  
 3 make agreements.” *SRAM*, 580 F. Supp. 2d at 902-03.<sup>7</sup> The Supreme Court has held that “exchanges of  
 4 current price information,” as alleged here, “of course, have the greatest potential for generating anti-  
 5 competitive effects and although not *per se* unlawful have consistently been held to violate the Sherman  
 6 Act.” *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n. 16 (1978) (internal citations  
 7 omitted). Courts recognize that trade association affiliations and attendance at industry events may be  
 8 alleged to show that putative conspirators had the opportunity and means to develop and/or further their  
 9 collusive scheme. *See Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001) (“[T]he frequency of the  
 10 meetings is itself problematic for the same reason that the exchange of current price data is suspect: It tends  
 11 to facilitate the policing of price conspiracies.”).<sup>8</sup> Plaintiffs are not required to connect *each* Defendant with  
 12 a specific NAMM meeting, program or alleged conversation. Proof of conspiracy can consist of the fact that  
 13 “defendants got together and exchanged assurances of common action or otherwise adopted a common plan  
 14 even though *no* meetings, conversations or exchanged documents are shown.” *In re Flat Glass Antitrust*  
 15 *Litig.*, 385 F.3d 350, 361 (3d Cir. 2004); *see also In re Graphics Processing Units Antitrust Litig.*, 540 F.  
 16 Supp. 2d 1085, 1096 (N.D. Cal. 2007) (“*GPUs II*”) (“[D]irect allegations of conspiracy are not always  
 17 possible given the secret nature of conspiracies. Nor are direct allegations necessary.”).

18 Fourth, the Complaint identifies the subject of the alleged conspiracy—the MAPPs and their  
 19

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20     <sup>7</sup> Defendants’ authorities stand for the unremarkable proposition that a firm’s membership in a trade  
 21 association—standing alone—does not amount to antitrust conspiracy. *See, e.g., In re Citric Acid Litig.*, 191  
 22 F.3d 1090, 1098 (9th Cir. 1999) (“Gathering information about pricing and competition in the industry is  
 23 standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we  
 24 would have to allow an inference of conspiracy whenever a trade association took almost any action.”); *Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962-64 (N.D. Cal. 2007) (following *Citric Acid*); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007) (following *Citric Acid*). As described throughout the Complaint, Plaintiffs allege for more than mere membership in NAMM  
 25 and attendance at NAMM events.

26     <sup>8</sup> Defendants’ citation to *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250,  
 27 1257 (W.D. Wash. 2009), is not on point. There, the plaintiffs made only “general allegations of  
 28 membership in trade organizations[,]” which were determined by the court to be inadequate to support an  
 antitrust claim in the absence of factual details regarding the dates and locations of actual trade association  
 meetings. Plaintiffs plead in their Complaint the precise factual detail missing in *Hawaiian & Guamanian  
 Cabotage*. (¶¶ 92, 95-100, 102-107)

1 implementation and enforcement. (¶¶ 1-5, 84-86, 93-113.) For example, the Complaint asserts that reports  
 2 from the January 2002 NAMM trade show stated “mention of MAP pricing was routinely included in just  
 3 about every new product presentation” (¶ 83) and that at the 2004 NAMM Summer Show manufacturers  
 4 “announced higher MAP prices in a bid to shore up dealer margins” (¶ 95). Regarding the terms and  
 5 enforcement of the MAPPs, the Complaint quotes a retailer who said that his company “had very little  
 6 choice but to honor manufacturer’s policies on advertised prices because otherwise it risks having its  
 7 supplies cut off or being delisted as an authorized distributor.” (¶ 109.)

8 Defendants fault Plaintiffs for not identifying the specific terms and conditions of each alleged  
 9 MAPP agreement. (Mem. at 7:23-28, 8:1-2.) This argument confuses what Plaintiffs will need to prove at  
 10 trial with what Plaintiffs need to allege to withstand a motion to dismiss. Conspiracies are typically  
 11 conducted in secret, and an antitrust complaint need not—and rarely does—contain detailed information of  
 12 the price-fixing agreement itself. *See, e.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651,  
 13 662 (7th Cir. 2002) (“most cases are constructed out of tissue of such [ambiguous] statements and other  
 14 circumstantial evidence, since outright confession [of conspiracy] would ordinarily obviate the need for a  
 15 trial.”). Allegations that provide circumstantial evidence of an agreement, like the exchanges of  
 16 competitively sensitive cost and pricing information alleged here, are sufficient under *Twombly* to “nudge”  
 17 the complaint “over the line from conceivable to plausible.”

18 Defendants cite two cases—*Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008) and *In re*  
 19 *Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007)—in support of their contention that  
 20 *Twombly* requires a plaintiff to plead the specifics of time, place and person. These cases are  
 21 distinguishable. Neither involved the level of factual content proffered here.

22 In *Kendall*, plaintiffs sued defendant credit card companies and banks alleging conspiracy to set fees  
 23 charged to merchants for credit card sales. The court noted, citing *Twombly*, that plaintiffs had failed, *even*  
 24 *having been a chance to conduct discovery*, to allege evidentiary facts as to the banks role in the conspiracy  
 25 beyond the collective legal conclusion that the “banks” knowingly participated in the alleged scheme. 518  
 26 F.3d at 1048. Without more factual content the “banks,” which were large institutions with hundreds of  
 27 employees, entering into contracts and agreements daily, would have no idea how to respond to the  
 28 allegations of a conspiracy. *Id.* at 1047. The court concluded that such “naked” assertions of conspiracy

1 stopped short of crossing the line between possibility and plausibility.

2 Similarly, in *Late Fee*, a case that involved allegations by credit card holders that major credit card  
 3 issuers charged excessive late-fees, the complaint failed to provide any information suggesting an  
 4 agreement. *Id.* at 956. As Judge Armstrong, who wrote the *Late Fee* decision later explained, “The  
 5 centerpiece of plaintiffs’ claims was set forth in a single paragraph of the complaint which was comprised of  
 6 a chart showing that several of the defendants charged the same or similar late fees.” *In re Flash Memory*,  
 7 643 F. Supp. 2d at 1146 (referencing *Late Fee*, 528 F. Supp. 2d at 962). Such generalized, unsupported  
 8 averments failed to satisfy the plausibility requirement. *Late Fee*, 528 F. Supp. 2d. at 962.

9 Here, unlike in *Kendall* or *Late Fee*, Plaintiffs allege detailed facts within a context that gives rise to  
 10 an inference of a collusive agreement. The Complaint describes the nature of the Defendants’ agreement,  
 11 the opportunities they shared to conspire, the mechanism for implementing the agreement, the  
 12 anticompetitive impact of the conspiracy, and the harm to consumers. More detailed allegations as to  
 13 person, place and time are not required. *See Packaged Ice*, 2010 U.S. Dist. LEXIS 65549, at \*50.

14                   **3. The Data Showing Unusual Retail Unit Price Increases During The Conspiracy  
 15                   Period Lend Support To Plaintiffs’ Claims**

16 The Complaint includes retail price data drawn from publicly-available sources. These data show  
 17 that in the years leading up to the alleged conspiracy, retail unit prices for guitars and guitar amplifiers fell  
 18 even as the demand for these products grew. (¶¶ 70-73.) Beginning in 2004, however, and throughout the  
 19 period the alleged conspiracy was in effect, retail prices for guitars and guitar amplifiers increased and  
 20 continued to rise—even as demand for these products fell—until the FTC’s investigation in 2008. (*Id.*)

21 Defendants contend that evidence of rising industry prices, even if proven, is insufficient in and of  
 22 itself to establish and inference of conspiracy, asserting that retail prices for fretted instruments and guitar  
 23 amplifiers can rise for any number of other lawful reasons. (Mem. at 8:26-28, 9:1-6.) Defendants’  
 24 arguments are misplaced, for two reasons.

25 First, it is not Plaintiffs’ obligation at the pleading stage to completely foreclose the possibility that  
 26 prices might have risen for legitimate economic reasons. Defendants cannot succeed on their motion merely  
 27 by positing that there could be a lawful explanation for the price increases. “[A] complaint need not be  
 28

1 dismissed where it does not ‘exclude the possibility of independent business action.’” *City of Moundridge v.*  
 2 *Exxon Mobil Corp.*, 250 F.R.D. 1, 5 (D.D.C. 2008) (*citing Twombly*, 550 U.S. at 557).

3 Second, Plaintiffs have satisfied *Twombly*’s pleading requirements by alleging retail price increases  
 4 that break with past industry practice. In *GPUs II*, the court explained “that ‘complex and historically  
 5 unprecedented changes in pricing structure made at the very same time by multiple competitors, and made  
 6 for no other discernable reason, would support a plausible inference of conspiracy.’” *GPUs II*, 540 F. Supp.  
 7 2d at 1092 (citing *Twombly*, 550 U.S. at 555, n.3). Here, as in *GPUs II*, Plaintiffs allege that the markets for  
 8 fretted instruments and amplifiers departed from historical pricing patterns, as retail unit prices increased  
 9 when the conspiracy was enforced even while demand slumped, despite years of price declines and  
 10 increased demand in the late 1990s and early 2000s. (¶¶ 70-73.) These allegations, coupled with other facts  
 11 consistent with conspiracy detailed above, are sufficient to state a claim.

12 The decisions cited by Defendants merely state that price increases, by themselves, do not plausibly  
 13 give rise to an inference of conspiracy. *See Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S.  
 14 209, 237 (1993) (“[R]ising prices do not *themselves* permit an inference of a collusive market dynamic.”  
 15 (emphasis added)); *Lubic v. Fid. Nat'l Fin., Inc.*, No. C08-0401 MJP, 2009 U.S. Dist. LEXIS 62092, at \*12  
 16 (W.D. Wash. July 20, 2009) (quoting *Brooke*). Here, the Complaint is not based on price increases alone.  
 17 Instead, the dramatic price shifts corroborate Plaintiffs’ numerous specific factual allegations regarding the  
 18 operation of Defendants’ conspiracy. Cf. *In re Flash Memory*, 643 F. Supp. 2d at 1146 (distinguishing  
 19 *Brooke* where de facto price increases were accompanied by allegations of collusive agreements).

20 Defendants also contend that the pricing data in the Complaint, which is in aggregate form and  
 21 drawn from public sources, is inconclusive because it does not show the actual retail prices charged for the  
 22 Manufacturer Defendants’ products, how specific product prices may have changed over time, or whether  
 23 the product mix within the reported category may have had an effect on the published average price. (Mem.  
 24 at 8:14-23.) This is just another way of saying that Defendants may be able to develop proof that the listed  
 25 price increases reflect legitimate economic realities. These factual disputes can—and should—be resolved  
 26 at a later time on a developed evidentiary record.<sup>9</sup>

27  
 28 <sup>9</sup> Defendants maintain, and have produced to the FTC, the specific transactional data for the actual prices

1           **4. The FTC's Investigation Bolsters The Plausibility Of Plaintiffs' Claims**

2       The FTC's investigation and the Consent Order bolster the plausibility of Plaintiffs' claims, and for  
 3 that reason, they may be considered by the Court. As numerous courts recognize, allegations concerning  
 4 government investigations into conduct similar to that alleged in a private antitrust complaint support the  
 5 plausibility of such allegations under *Twombly*.

6       In *Starr*, 592 F.3d at 324-25, the Second Circuit reversed dismissal and held that government  
 7 investigations into the underlying conduct alleged in a private antitrust complaint were factors supporting  
 8 the plausibility of the plaintiffs' claim. In rejecting the defendants' argument that those investigations were  
 9 irrelevant because they had been closed without charges, the Second Circuit found no authority "to support  
 10 the proposition that a civil antitrust complaint must be dismissed because an investigation undertaken by the  
 11 Department of Justice found no evidence of conspiracy." *Id.* at 325. Instead, the court concluded that the  
 12 government investigations bolstered the plausibility of the plaintiffs' conspiracy allegations. *Id.* *Starr* also  
 13 disposes of Defendants' argument that the "only reasonable inference to draw from the FTC closing its  
 14 investigation as to [defendants other NAMM] is that the FTC did not find even a suggestion of  
 15 wrongdoing." (Mem. at 11:12-18.) The Second Circuit squarely held that no such inference was available.

16      Other courts have held that the allegations concerning government investigations bolster the  
 17 plausibility of private antitrust allegations. *See Hinds County*, 700 F. Supp. 2d at 394 ("Although pending  
 18 government investigations may not, standing alone, satisfy an antitrust plaintiff's pleading burden,  
 19 government investigations may be used to bolster the plausibility of § 1 claims."); *Packaged Ice*, 2010 U.S.  
 20 Dist. LEXIS 65549, at \*65 ("This Court finds that the government investigations surrounding the Packaged  
 21 Ice industry ... to which Plaintiffs refer in the [complaint], while not determinative standing alone as to the  
 22 plausibility of Plaintiffs' claims of conspiracy, do bolster the plausibility analysis and heighten the Court's  
 23 expectation that 'discovery will reveal evidence of illegal agreement.'"); *Hyland v. Homeservices of*  
 24 *America, Inc.*, No. No. 3:05-CV-612-R, 2007 U.S. Dist. LEXIS 65731, at \*9 (W.D. Ky. Aug. 17, 2007)  
 25 (finding that Department of Justice enforcement actions supported price-fixing allegations); *In re Tableware*  
 26 *Antitrust Litig.*, 363 F. Supp. 2d 1203, 1205 (N.D. Cal. 2005) ("A plaintiff may surely rely on governmental

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27  
 28 charged for the Manufacturer Defendants' products bearing on these issues. Plaintiffs cannot be faulted for  
 not having pleaded this non-public information in the Complaint.

1 investigations, but must also ... undertake his own reasonable inquiry and frame his complaint with  
 2 allegations of his own design.”).

3 Courts routinely allow allegations regarding government complaints, consent decrees or similar  
 4 matters when the entities creating these types of documents are responsible for law enforcement in the  
 5 particular areas germane to the plaintiffs’ claims. Reciting such information is not only permissible at the  
 6 pleading stage, it is especially appropriate to include allegations that are based upon documents prepared by  
 7 such “reliable sources.” *See, e.g., Gray v. Bayer Corp.*, No. 08-4716 (JLL), 2010 U.S. Dist. LEXIS 33040,  
 8 at \*83 (D.N.J. March 31, 2010) (“[T]he FTC is the type of organization specifically tasked with  
 9 investigating and prosecuting the very claims alleged by the Plaintiff in this matter. Defendant cites no  
 10 binding legal authority for the proposition that a party may not rely on relevant action taken by the FTC to  
 11 provide a proper context for its own claims . . . .”); *de la Fuente v. DCI Telecommunications, Inc.*, 259 F.  
 12 Supp. 2d 250, 260 (S.D.N.Y. 2003) (SEC investigation); *In re New Century*, 588 F. Supp. 2d 1206, 1220  
 13 (C.D. Cal. 2008) (bankruptcy examiner’s report).

14 The FTC’s investigation and settlement with NAMM are relevant. The FTC’s investigation involves  
 15 the same key players and the same time period, and was directed to the same collusive behavior as is alleged  
 16 here. The FTC’s complaint, its Analysis, and other public statements support Plaintiffs’ allegations that  
 17 Defendants entered into the price-fixing conspiracy alleged in the Complaint. (¶ 121 (“[A]t meetings and  
 18 programs sponsored by NAMM, competing retailers and other NAMM members discussed strategies for  
 19 raising retail prices. . . .[S]uch discussions could lead competing NAMM members to refuse to deal with a  
 20 manufacturer, distributor, or retailer unless minimum advertised price policies, or increases in minimum  
 21 advertised prices, were observed and enforced against discounters. . . . [F]irms also exchanged information  
 22 on competitively-sensitive subjects – prices, margins, minimum advertised price policies and their  
 23 enforcement.””) (quoting Analysis).) The logical implication of the FTC’s statement, its use of the broader  
 24 term “NAMM members” in its Analysis, and its repeated references to the “***exchange of information***  
 25 ***between or among Musical Product Manufacturers***” in the Consent Order is that the FTC’s investigation  
 26 concerned “the implementation of collusive strategies” not only by NAMM’s “retail members,” but also by  
 27 NAMM’s “manufacturer” members. (¶¶ 121-22 (emphasis added).) That is precisely what Plaintiffs allege  
 28 here. These facts, along with numerous others pleaded in the Complaint, raise Plaintiffs’ “right to relief

1 above the speculative level.” *Twombly*, 550 U.S. at 570.

## 2       **B. Plaintiffs Plead All Required Elements of a “Hub-And-Spoke” Conspiracy**

3 Defendants next contend that Plaintiffs have not pleaded facts to show that each Manufacturer  
 4 Defendant conspired with Guitar Center as a “hub” to implement and enforce MAP policies for the  
 5 anticompetitive purpose of eliminating competition and increasing retail prices for the Manufacturer  
 6 Defendants’ products. (Mem. at 11-12.) A review of the Complaint shows otherwise.

7       To allege a “hub-and-spoke” conspiracy, a plaintiff must plead facts to show: (1) an overall unlawful  
 8 plan or “common design”; (2) knowledge that the others must be involved is inferable to each member; and  
 9 (3) a showing of each alleged member’s participation. *See Elder-Beerman Stores Corp. v. Federated Dep’t*  
 10 *Stores, Inc.*, 459 F.2d 138, 146 (6th Cir. 1972). A plaintiff need not plead that each co-conspirator knew the  
 11 identity of all other conspirators or the full extent of the conspiracy. *See In Re Ins. Antitrust Litig.*, 723 F.  
 12 Supp. 464, 483 (N.D. Cal. 1989), *rev’d on other grounds by* 938 F.2d 919 (9th Cir. 1991). “But, there must  
 13 be a common agreement and understanding.” *Elder-Beerman*, 459 F.2d at 483. “[T]he allegations and  
 14 proof must reflect a wheel and spoke arrangement in which a single person at the hub implements the  
 15 conspiracy by a series of arrangements with others to carry out the purpose of their conspiracy. … There  
 16 must be a connection among all the alleged participants sufficient to support a finding that they entered into  
 17 the conspiracy.” *Id.* at 484. Plaintiffs have satisfied these pleading mandates.

18       First, Plaintiffs have pleaded facts to support the existence of an overall plan or common design. The  
 19 Complaint alleges that Guitar Center, its suppliers (the Manufacturer Defendants) and NAMM’s other retail  
 20 members met and agreed on an overall plan to exchange competitive cost and pricing information, devise  
 21 and implement MAPPs for the Manufacturer Defendants’ fretted instruments and guitar amplifiers, and  
 22 strictly enforce the MAPPs by requiring that all retailers charge minimum retail prices for the Manufacturer  
 23 Defendants’ products, or face sanctions if they did not. (¶¶ 85, 93, 108, 110-13.)

24       Second, Plaintiffs have pleaded facts to support an inference that each member of the alleged  
 25 conspiracy had knowledge of their co-conspirators’ involvement in the plan. The Complaint alleges that the  
 26 conspiracy was facilitated through NAMM, and Plaintiffs have pleaded facts to show that each Defendant  
 27 regularly attended NAMM’s semi-annual trade shows and programs, where they exchanged pricing  
 28 information with each other and agreed to strictly enforce the MAPPs. (¶¶ 26, 28, 30-34, 75, 92-94, 98-99,

1 101-02, 107, 121.) The Complaint also alleges that the Manufacturer Defendants conspired with each other  
 2 to implement horizontal restraints on trade by uniformly agreeing to impose and enforce the MAPPs with  
 3 the understanding that its competitors would do the same to increase their profit margins. (¶¶ 86, 90, 108,  
 4 110, 111-13.)<sup>10</sup> These facts, and others cited in the Complaint, are sufficient to infer that the members of  
 5 the alleged conspiracy had knowledge of their co-conspirators' involvement in the conspiracy.

6 Third, Plaintiffs have pleaded facts to show each Defendant's participation in the scheme. As  
 7 discussed above, Defendants' representatives regularly attended the NAMM meetings and many served on  
 8 NAMM's board of directors. (¶¶ 28, 30-34, 93-94, 98-99, 103, 107.) These facts are sufficient to show that  
 9 each Defendant furthered the exchange of cost and pricing information and knew of and facilitated  
 10 discussions about MAPPs and mechanisms to enforce them.<sup>11</sup>

### 11 C. The Alleged Conspiracy Adversely Affected Competition

12 Defendants challenge Plaintiffs' allegation that Guitar Center, as the dominant specialty music  
 13 retailer, "was able to and did use its dominant position in the market to enforce the conspiracy by threatening  
 14 manufacturers that were lax in their own enforcement of the MAPPs." (¶ 5.) The Complaint describes this  
 15 part of the conspiracy as a "series of vertical restraints on trade (the MAPPs), [that] had the effect of a  
 16 horizontal restraint on trade because the Manufacturer Defendants agreed to enforce similar MAPPs." (*Id.*)

17 Defendants correctly point out that Section 1 claims involving vertical pricing conspiracies are now  
 18 governed by *Leegin*, 551 U.S. at 877. In *Leegin*, the Supreme Court held that vertical price restraints are not  
 19 *per se* unlawful, but must instead be evaluated on a case-by-case basis under a "rule of reason" analysis. *Id.*  
 20

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21 <sup>10</sup> Defendants' citation to the *Illinois Brick* bar against the recovery of damages by indirect purchasers is  
 22 inapposite. See *Kendall v. Visa U.S.A., Inc.*, 518 F.2d 1042, 1049-50 (9th Cir. 2008) (citing *Illinois Brick v. Illinois*, 431 U.S. 720 (1977)). Here, Plaintiffs purchased directly from the Manufacturer Defendants' co-conspirator, Guitar Center, and facts related to the conspiracy are alleged in detail in the Complaint. *Illinois Brick* does not apply. See *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1212-14 (9th Cir. 1984). Even if Plaintiffs are considered indirect purchasers, *Illinois Brick* would not preclude them from pursuing their state law claims. See *California v. ARC Am. Corp.*, 490 U.S. 93, 97-98 (1989).

25 <sup>11</sup> Defendants assert that a manufacturer's reaction in response to a retailer's complaint is not by itself  
 26 evidence of a conspiracy, citing three cases. Those cases were not decided on motions to dismiss, so the  
 27 plaintiffs were required to present *evidence* that tended to exclude the possibility that the defendants were  
 28 acting independently. *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-764 (1984) (trial);  
*InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 166 (3d Cir. 2003) (summary judgment); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group*, 878 F.2d 801 (4th Cir. 1989) (summary judgment). At this stage, Plaintiffs are only required to demonstrate that their claims are plausible.

1 at 889. To succeed under a “rule of reason” analysis, a plaintiff must show that the alleged vertical price  
 2 restraint produces “significant anticompetitive effects” within a “relevant market.” *Hairstron v. Pacific 10*  
 3 *Conf.*, 101 F.3d 1315, 1317 (9th Cir. 1996). At the pleading stage, however, a plaintiff need only allege that:  
 4 (1) a relevant market exists, and (2) the defendants have power within that market or the alleged had an  
 5 adverse competitive effects. *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir.  
 6 2008). The Complaint satisfies these requirements.

7           **1. The Complaint Alleges A Plausible Market For Fretted Instruments And Guitar**  
**Amplifiers**

8           Market definition for antitrust purposes involves a “deeply factual inquiry,” and “for this reason a  
 9 court must hesitant to grant a motion to dismiss for failure to plead a relevant market.” *Jamsports & Entm’t,*  
 10 *LLL v. Paradama Productions, Inc.*, No. 02-C-2298, 2003 U.S. Dist. LEXIS 6100, at \*17 (N.D. Ill. Apr. 21,  
 11 2003). There is no requirement that market definition be pled with specificity. *TYR Sport Inc. v. Warnaco*  
 12 *Swimwear, Inc.*, 679 F. Supp. 2d 1120, 1127-28 (C.D. Cal. 2009) (denying motion to dismiss and rejecting  
 13 defendants’ argument that market definition was insufficient because it contained no allegations regarding  
 14 interchangeability or cross-elasticity of demand). As the Ninth Circuit has explained:

15           An antitrust complaint . . . survives a Rule 12(b)(6) motion unless it is apparent from the face  
 16 of the complaint that an alleged market suffers a fatal defect. And since the validity of the  
 17 ‘relevant market’ is typically a factual element rather than a legal element, alleged markets  
 18 may survive scrutiny under Rule 12(b)(6) subject to factual testing by summary judgment or  
 trial.

19           *Newcal*, 513 F.3d at 1045.

20           A plaintiff satisfies the relevant market requirement if the complaint contains facts that suggest an  
 21 “area of effective competition in which buyers of the[] products can find alternative sources of supply [and]  
 22 there are no other products that are interchangeable . . . . within this geographic market.” *TYR Sport*, 679 F.  
 23 Supp. 2d at 1129 (citing *Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir.  
 24 1999)). A product market typically is defined to include the pool of goods that qualify as economic  
 25 substitutes because they enjoy reasonable interchangeability of use and cross-elasticity of demand. *Oltz v.*  
 26 *St. Peter’s Community Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988). It also may be narrowed to account for  
 27 identifiable submarkets or product clusters. See *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962);  
 28 *Thurman Indus., Inc. v. Pay ‘N Pak Stores*, 875 F.2d 1369, 1374 (9th Cir. 1989). Industry or public  
 recognition of the market or submarket as a separate economic entity, the product’s peculiar characteristics

1 and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and  
 2 specialized vendors are among the practical criteria a Court may use to determine whether a plausible  
 3 relevant market has been alleged in a particular case. *See Brown Shoe*, 370 U.S. at 325.

4 The Complaint satisfies these standards. It defines the relevant markets as the U.S. retail markets for  
 5 new, high-quality fretted instruments and new, high-quality guitar amplifiers. (¶ 1, 38, 54, 58, 67.) Fretted  
 6 instruments, in turn, includes identifiable product clusters, *e.g.*, electric guitars, acoustic guitars, bass guitars,  
 7 banjos and mandolins. (*Id.*) This is consistent with *Brown Shoe*, where the Supreme Court upheld the trial  
 8 court's finding that men's, women's and children's shoes made up separate submarkets, in light of the  
 9 distinct customer groups for and the particular characteristics of each type of shoe. 370 U.S. at 326.<sup>12</sup>

10 The market definitions use the term "new" to distinguish the defined markets and submarkets from  
 11 markets for used or second-hand products, and the term "high-quality" is distinguish the defined markets  
 12 and submarkets from the markets for toys, generics, knock-offs, or unbranded products. This is sensible.  
 13 While it is reasonable to infer that an electric guitar manufactured by Fender may be reasonably  
 14 interchangeable with one made by Yamaha, Gibson, Kaman or Hoshino, consumers seeking to purchase a  
 15 new, high-quality electric guitar likely would not switch to a low cost knock-off—or to another instrument,  
 16 such as an electric keyboard—simply because of a retail price increase in "high-quality" electric guitars.

17 Consistent with *Brown Shoe*, the Complaint also contains other details that support the plausibility of  
 18 the product markets and submarkets alleged here. The Complaint also alleges that "new, high-end" fretted  
 19 instruments and guitars amplifiers require special production facilities, are used by professional musicians,  
 20 carry recognizable, desirable brand-names, and are sold primarily at specialty retail stores, such as Guitar  
 21 Center. (¶¶ 11-25, 31-32, 53, 64, 66, 69.)

22 **2. The Complaint Alleges That Defendants Had The Ability Or Capacity To  
 23 Adversely Affect Retail Price Competition In The Markets For Fretted  
 24 Instruments And Guitar Amplifiers**

25 To meet the second "rule of reason" pleading element, the adverse-effect requirement, Plaintiffs must  
 26 allege facts to plausibly suggest either that the alleged conspiracy had an adverse competitive effect within

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27 <sup>12</sup> Plaintiffs agree with Defendants' assertion "it is implausible to suggest consumers who intend to purchase  
 28 mandolins, for example, would "switch" to purchasing banjos or guitars if retailers increased the prices that  
 they charge for mandolins" (Mem. at 16:20-21, 17:1-2), but the argument misses the mark. As these  
 authorities make plain, product markets may properly contain identifiable submarkets or product clusters.

1 the defined markets or that Defendants have power within those markets. *See Newcal*, 513 F.3d at 1044.  
 2 These are alternative pleading standards. Where plausible allegations of actual competitive injury are made,  
 3 it is not necessary to plead market power. *See FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61  
 4 (1986) ("‘proof of actual detrimental effects’ . . . can obviate the need for an inquiry into market power")  
 5 (internal citation omitted)).

6 An actual adverse impact may be asserted "by examining factors like reduced output, increased  
 7 prices and decreased quality." *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 246, 264 (2d  
 8 Cir. 2001). Here, Plaintiffs allege that the efforts of Defendants to implement and enforce MAPPs for  
 9 fretted instruments and guitar amplifiers had the adverse impact of higher retail prices. (¶¶ 3, 70-73, 113,  
 10 117-121, 140, 145, 150, 159.) *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 477  
 11 (1992) ("It is clearly reasonable to infer that Kodak has market power to raise prices and drive out  
 12 competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.") Plaintiffs  
 13 allege facts to suggest that discovery will reveal an actual anticompetitive injury in the form of higher retail  
 14 prices for Manufacturing Defendants' fretted instruments and guitar amplifiers. This is sufficient.

15 Plaintiffs also allege that Guitar Center has market power as both a purchaser and seller of fretted  
 16 instruments and guitar amplifiers. Market power has been defined as "the power to control prices or exclude  
 17 competition." *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 126-27 (2d Cir. 1981). It  
 18 may be shown by evidence of "specific conduct indicating the defendant's power to control prices or  
 19 exclude competition." *Id.* at 130. Market share may be used as a proxy for market power. *See id.* Plaintiffs  
 20 have alleged facts to show that Guitar Center, while not a monopolist, enjoys a dominant position—both as a  
 21 buyer and seller of fretted instruments and guitar amplifiers.

22 During the Class Period, Guitar Center was the dominant specialty retail sales outlet for these  
 23 products. (¶¶ 53-56, 58-63.) Guitar Center had a national and online presence, and eight times as many  
 24 retail stores and five times as many sales revenues as its next largest competitor, Sam Ash. (¶¶ 55-57.)  
 25 Perhaps most telling, in 2007, Guitar Center's estimated annual revenues of \$2.1 billion exceeded the  
 26 combined revenues of the 100 next largest specialty music retailers. (¶ 57.) Guitar Center's dominance over  
 27 the manufacturers was, therefore, a factor of both its rank as the largest retail outlet and the fragmentation of  
 28 the rest of the industry. *See, e.g., Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196,

1 1204 (9th Cir. 1975) (45%-75% market share could be a monopoly where rest of industry was fragmented);  
 2 *Dickson v. Microsoft Corp.*, 309 F.3d 193, 209 n.20 (4th Cir. 2002) (noting that being the “largest” in a  
 3 relevant market “says nothing of a firm’s ability to affect competition in that market” absent information  
 4 about the distribution the market).

5       Guitar Center had nearly 30% of the total U.S. music retail sales between 2004 and 2008. (¶ 56.) It  
 6 is plausible that Guitar Center enjoyed a much larger market share within retail the fretted instrument and  
 7 guitar amplifiers markets alleged here. Guitar Center was the largest retail customer of many of its  
 8 manufacturers and suppliers, including Defendants Fender and Gibson. (¶ 60.) Therefore, Guitar Center  
 9 was able to use its power to enforce collusion among its various suppliers. The Complaint details how  
 10 Guitar Center exercised its market substantial power to facilitate the alleged conspiracy by dictating MAPPs  
 11 to manufacturers, influencing product offerings and pricing factors, procuring preferential pricing from  
 12 manufacturers, and “strong-arming” manufacturers, including Yamaha and Fender, into not selling their  
 13 products to competing stores that planned to open near Guitar Center store locations. (¶¶ 60-65, 88-89.)  
 14 These facts support a plausible inference that Guitar Center had the ability to amplify its own market power  
 15 by playing favorites—or even threatening to play favorites—among its suppliers, and to punish those who  
 16 failed to adhere to or honor the MAPPs.

17       Regarding barriers to entry, if Guitar Center threatened to cancel or delay a purchase in 2007, then a  
 18 manufacturer would need to double its sales through each of the 100 next largest retailers to compensate for  
 19 the loss. The lag time before the 100 next largest retailers could substitute as distribution outlets, as well as  
 20 the likely increase in inefficiency, gave Guitar Center significant market power. The relevant barrier to  
 21 entry in this case is not the difficulty with which a retailer could set up a store and compete with a single  
 22 Guitar Center location, it is the difficulty with which a manufacturer could replace Guitar Center as a  
 23 distribution outlet for 30% of its sales. Defendants’ authorities addressing a prospective retailer’s cost of  
 24 opening a new store are off-point.

25       Plaintiffs’ allegations also plausibly suggest that the combined market power of the Manufacturing  
 26 Defendants was significant. The Complaint alleges that the Manufacturer Defendants ranked among the  
 27 largest manufacturers and distributors of fretted instruments and guitar amplifiers between 2004 and 2008.  
 28

1 When they decided to impose and enforce restrictive MAPPs, the Manufacturing Defendants had leverage to  
2 coerce retailers to accept MAPPs in their distribution contracts. (¶¶ 65-68.)

3 Defendants argue that there is a presumption that a 30 percent share of a market is insufficient to confer market power. The Ninth Circuit has, however, stated: “We are reluctant to apply such bright-line rules regarding market share in deciding whether a defendant has market power.” *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 n.10 (9th Cir. 1995). Instead, the Ninth Circuit states that “the far wiser approach” is to use market share as one factor among many in evaluating market power. *Id.*<sup>13</sup>

8           **D. Plaintiffs’ State Law Claims Under the California Unfair Competition Law And  
9 Massachusetts Consumer Protection Law Are Well-Pledged.**

10 Plaintiffs’ claims under California and Massachusetts law, while distinct from the Sherman Act claim, arise from the same allegations and assert the same price-fixing conspiracy.<sup>14</sup> Because Plaintiffs’ Sherman Act claim is plausible, the state law claims also withstand Defendants’ motion to dismiss.

13 **VII. CONCLUSION**

14 For the foregoing reasons, Plaintiffs respectfully submit that the Court should deny Defendants’ omnibus motion to dismiss under Rule 12(b)(6). In the event that the Court finds that the Complaint is lacking in some respect, Plaintiffs seek leave to file an amended complaint.

17 DATED: September 24, 2010

Respectfully submitted,

18           **GIRARD GIBBS LLP**

20 By: /s/ Elizabeth C. Pritzker  
21           Elizabeth C. Pritzker

23           <sup>13</sup> The cases cited by Defendants primarily involve attempted monopolization. See, e.g., *Rebel Oil*, 51 F.3d at 1438 (collecting attempted monopolization cases). Defendants thus confuse monopoly power (which except in extraordinary circumstances does not exist at market share levels below 60% or 70%) with market power under the rule of reason, which may and often does occur at lower levels.

26           <sup>14</sup> California’s Cartwright Act is similar in language and purpose with the Sherman Act, but has different origins and can yield different results in certain situations. *Freeman v. San Diego Ass’n of Realtors*, 77 Cal. App.4th 171, 183 n.9 (1999). The California Unfair Competition Law and the Massachusetts Consumer Protection Act are both broader than the Sherman Act, but are given similar application where the alleged unfair business practices concerns antitrust violations. *Chavez v. Whirlpool Corp.*, 93 Cal. App.4th 363, 375 (2001); *Suzuki of Western Mass, Inc. v. Outdoor Sports Expo, Inc.*, 126 F. Supp. 2d 40, 50 (D. Mass. 2001).

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*Lead-Liaison Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 24, 2010 I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 24, 2010.

/s/ *Elizabeth C. Pritzker*  
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